UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

HAWAII JOB CORPS/MANAGEMENT
& TRAINING CORPORATION

Employer

and

JOYCE NELSON Case 37-RD-409

Petitioner, An Individual

and

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL 142, AFL-CIO

Union

DECISION AND DIRECTION OF ELECTION

Hawaii Job Corps/Management & Training Corporation (the Employer) is a Delaware corporation, which operates a Hawaii Job Corps Center in Waimanalo, Hawaii. On April 12, 1996, in Case 37-RC-3748, the International Longshore and Warehouse Union, Local 142, AFL-CIO (the Union) was certified as the exclusive collective-bargaining representative of the following unit of employees of the Employer:[1]

> All full-time Residential Advisers, including Senior Residential Advisers, Residential Advisers I, Residential Advisers II; excluding Center Director, Program Director, Group Life Manager, Residential Living Supervisors, on call residential advisers, and supervisors as defined in the Act.

[1] I take administrative notice of and include in the record as Board Exhibit 3, a copy of the NLRB Certification of Representative in Case 37-RC-3748.

The Employer and the Union were parties to a collective-bargaining agreement effective from January 1, 2003, to and including December 31, 2005, herein called the Agreement, covering the following unit:

> All full-time Residential Advisors, including Senior Residential Advisors, Residential Advisors I and Residential Advisors II of the Company; excluding the Center Director, Deputy Director, Group Life Manager, Residential Living Supervisors, On-Call Residential Advisors, and all managerial, secretarial and office clerical employees, guards or watchmen, confidential employees and supervisors as defined by the Labor Management Relations Act of 1947, as amended, and any other employees not covered.

Petitioner Joyce Nelson filed the decertification petition in this case on February 13, 2006.[2] No party disputes that the above contractual unit would be the appropriate unit within which to conduct a decertification election. The only issue raised in this proceeding is whether a contract bar exists to the decertification petition.[3] After carefully reviewing the record and for the reasons discussed below, I find that no contract bar exists and I decline to dismiss the petition. Accordingly, I am directing an election in the above-described contractual unit.

FACTS

The record contains the Agreement, pieces of correspondence, and a memorandum of agreement between the Employer and Union. Clement A. Valeri, the Senior Labor Relations Consultant of the Hawaii Employers Council (HEC), represented the Employer during contract negotiations, and Shane Ambrose, the Union's Oahu Division Business Agent, represented the Union. Both Valeri and Ambrose were present during the hearing in this matter. No Employer or Union officials made formal appearances at the hearing.

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[2] All dates are 2006 unless otherwise indicated.

[3] While the Union attempted to dispute the showing of interest for the petition, I concur with the ruling of the hearing officer that this issue is for administrative determination and is not properly raised at the hearing. See *Union de Tronquistas de Puerto Rico, Local 901*, 340 NLRB 523 (2003); *Gaylord Bay Co.*, 313 NLRB 306, 306-307 (1993); see also NLRB Casehandling Manual (Part Two) Representation Case Procedures, Sections 11021, 11028 and 11184.

The record shows that on about February 9, the Employer and the Union reached a tentative agreement, which adopted the terms of the Agreement with modifications to various provisions. On February 9, Valeri sent Ambrose a letter by facsimile transmission, attaching a copy of a document entitled "Memorandum of Agreement," with the words "DRAFT" printed four times above the title (Draft MOA). The cover letter sent by Valeri to Ambrose with the Draft MOA states in relevant part, "enclosed please find for your review and approval, a "DRAFT" tentative agreement which I believe accurately reflects the understanding reached between the Company and the Union for a new collective bargaining agreement . . . covering Residential and Senior Residential Advisors." The letter requests that Ambrose review the draft to ensure that it meets with his understanding and to contact Valeri if any corrections or adjustments are required. In response to a request by the Union that the Employer execute an extension agreement for the expired Agreement, Valeri's letter states that, "the Company sees no logical reason or need for an 'Extension of CBA' since the parties have already reached a tentative agreement on a new contract for Residential and Senior Residential Advisors." The cover page of the Draft MOA reads as follows:

TENTATIVE COLLECTIVE BARGAINING AGREEMENT

BY AND BETWEEN

HAWAII JOB CORPS/MANAGEMENT & TRAINING CORPORATION

[the Company]

AND THE

ILWU, LOCAL 142 [The Union]

Covering Residential Advisors and Senior Residential Advisors

Dated: February 9, 2006

> The enclosed document represents a **"DRAFT"** tentative agreement reached between the Company and the Union during their contract negotiations on February 9, 2006, for a new collective bargaining agreement [CBA] effective February 1, 2006 through and including January 31, 2007.
>
> The enclosed new CBA is considered tentative in nature, and is subject to all the following before becoming final:
>
> 1. Review and approval by the Company and the Union.
>
> 2. Ratification and approval by bargaining unit employee members of the Union; and
>
> 3. Signing of the new Agreement by the authorized represents [sic] of the Company and the Union.

The Draft MOA adopts the language of the Agreement except as expressly modified. The modifications include changes regarding recognition and coverage, seniority, hours of work, reopener, duration, wages, a new discretionary merit pay increase provision, and a letter of understanding regarding informal grievances. The Draft MOA sent by the Employer on February 9, was not signed by an Employer official.

The record also includes a cover letter from Union Business Agent Ambrose to Valeri, dated February 9, in which Ambrose states that the language of the "Eligibility for March 1, 2006 Discretionary Merit Based Pay Increase," section at page six of the Draft MOA had not been discussed and/or proposed by the Company or the Union during the February 9 bargaining session. Ambrose's' letter references an attached revised MOA from which the objected-to provision has been omitted. The revised MOA forwarded by Ambrose also omits the word "Draft" and does not include the cover page quoted above listing the conditions precedent. In his letter, Ambrose requests that Valeri "[p]lease have the employer sign the Memorandum of Agreement as to finalize the tentative agreement reached on February 9, 2006." Union President Galdones' signature appears on

page six (where the objected-to provision was removed) and on the last page of the revised MOA with the hand-written date of February 9.

Lastly, the record includes a letter, dated February 14, from Valeri to Michael M. Murata, the Contract Administrator for the Union, confirming the hand-delivery by the Union of copies of the MOA to HEC's office on February 13. In the letter, Valeri refers to "a number of fatal flaws and irregularities" in these hand-delivered copies of the MOA. However, the only "flaw or irregularity" described in Valeri's letter is the assertion that because the Employer had faxed the revised MOA to the Union on February 10, and the MOA had not been ratified by the Union's membership until February 10,[4] that Galdones must have "back-dated" his signature to February 9. In the letter, Valeri refers to this backdating as "highly irregular and improper," and states that it cannot be accepted by the Company.[5] The letter states that the Employer would delete the February 9 date from the MOA, forward the MOA to the Company in Waimanalo and to the U.S. Mainland for signature by the authorized representative of the Company, and then use the date that the MOA is signed by the Employer's authorized representative instead of February 9. The Employer promised to send the MOA to the Union to initial the corrected date. The February 14 letter concludes that, "[o]nce that has been completed, the tentative agreement will then become final and its terms and conditions will be implemented and honored by the Company."

The underlying decertification petition was filed on February 13.

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[4] The record does not include a copy of the document sent by the Employer to the Union on February 10, but it apparently reflects the Employer's agreement to remove the provision entitled "Eligibility for March 1, 2006 Discretionary Merit Based Pay Increase."

[5] I note that the nothing in the record explains why Galdones' signature and February 9 date also appears on the Employer's Draft MOU sent to the Union on February 9, and on the MOU that the Union asserts that it sent to the Employer on the same date, as described above. As discussed below, resolving this enigma is unnecessary to reach a decision in this case.

ANALYSIS

The Board has long held that for contract bar purposes, an agreement must meet certain formal and substantive requirements, including that the contract: (1) be signed by both parties prior to the filing of the petition that it would bar, and (2) contain substantial terms and conditions of employment sufficient to stabilize the parties' bargaining relationship. *Appalachian Shale,* 121 NLRB 1160, 1161-1162 (1958). The party asserting a contract bar bears the burden of proving that these conditions are met. See *Road & Rail Services, Inc.,* 344 NLRB No. 43 (March 31, 2005); *Roosevelt Memorial Park ,* 187 NLRB 517 (1970); *Appalachian Shale, supra*.

While the revised MOA in the record fulfills the second condition cited above, I find that the Union has failed to sustain its burden to establish that the contract was signed by the Employer prior to the filing of the decertification petition on February 13. While the Board does not require that the document or documents asserted as a contract bar be a formal collective-bargaining agreement or that the parties' signatures appear on the same document, and the Board has held that signed informal documents laying out substantial terms and conditions of employment can serve as a bar, it nevertheless requires that such documents "clearly set out the terms of the agreement and . . . leave no doubt that they amount to an offer and acceptance of those terms." *B. C. Acquisitions, Inc. d/b/a Branch Cheese*, 307 NLRB 239 (1992); see also *Waste Management of Maryland, Inc*., 338 NLRB 1002, 1002-1003 (2003); *De Paul Adult Care Communities, Inc*., 325 NLRB 681 (1998).

Neither version of the MOA contains the signature of an Employer representative. Though the parties clearly reached a tentative agreement on February 9, which was embodied in the revised MOA, there is no evidence that the Employer signed the MOA prior to February 13, the date upon which the decertification petition was filed. Nor does the documentation in the record serve to establish the Employer's acceptance of the terms of the revised MOA as the parties' collective-bargaining agreement. To the contrary, the Employer's cover letter to the Draft MOA, sent to the

Union on February 9, clearly shows that the Employer considered the Draft MOA as only a tentative agreement, and that before it could be considered a final agreement, certain conditions had to be met. These conditions included that the new agreement be signed by an authorized Employer representative. Valeri's letter of February 14 is consistent with this condition precedent to the establishment of a binding agreement since it recites his intention to submit the revised MOA to the Employer's Waimanalo and U.S. Mainland offices, "for signature by the authorized representative of the Company." In sum, there is no contract signed by the Employer and the documents in the record do not establish the parties' intent to memorialize their contract through their exchange of such memoranda and correspondence. I therefore conclude that no contract bar exists to the processing of the instant petition and I decline to dismiss the petition. *De Paul Adult Care Communities, Inc., supra*; *Branch Cheese, supra,* 307 NLRB at 240. [6]

Accordingly, I am ordering an election in the unit set forth above, which is co-extensive with the existing contractual unit.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter[7] and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

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[6] Having reached this conclusion, I find irrelevant the issue of whether the Union's president executed the MOA on February 9 or on some other date on or before February 13, when Valeri asserts it was hand-delivered to the HEC office. Nor do I find it necessary to address the assertion contained in Valeri's February 14 letter that the MOA contained "a number of fatal flaws and irregularities," that are not disclosed in the record.

[7] I am including in the record as Joint Exhibit 1, a copy of the parties' Post-Hearing Joint Stipulation, dated May 1, 2006.

2. Based on the parties' stipulation, I find that the Employer is an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated, and I find, that the Union is a labor organization within the meaning of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time Residential Advisors, including Senior Residential Advisors, Residential Advisors I and Residential Advisors II of the Company; excluding the Center Director, Deputy Director, Group Life Manager, Residential Living Supervisors, On-Call Residential Advisors, and all managerial, secretarial and office clerical employees, guards or watchmen, confidential employees and supervisors as defined by the Labor Management Relations Act of 1947, as amended, and any other employees not covered.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the **INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142, AFL-CIO** or by **no union**. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work

during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their status as such during the eligibility period, and the replacements of those economic strikers. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, Subregion 37, 300 Ala Moana Boulevard, Room 7-245, Post Office Box 50208, Honolulu, Hawaii 96850, on or before September 15, 2006. No extension of time to file this list will be

granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (808)541-2818. Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact Subregion 37.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

D. Notice of Electronic Filing

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, D.C. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on September 22, 2006. The request may not be filed by facsimile.

DATED at San Francisco, California, this 8th day of September 2006.

/s/ *Joseph P. Norelli*

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Joseph P. Norelli, Regional Director
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